

# **THE SRBA MEDIATION/ NEZ PERCE TRIBE WATER RIGHTS SETTLEMENT**

**IWUA SUMMER WATER LAW  
AND  
RESOURCE ISSUES SEMINAR**

**June 21, 2004**



# Overview of Presentation

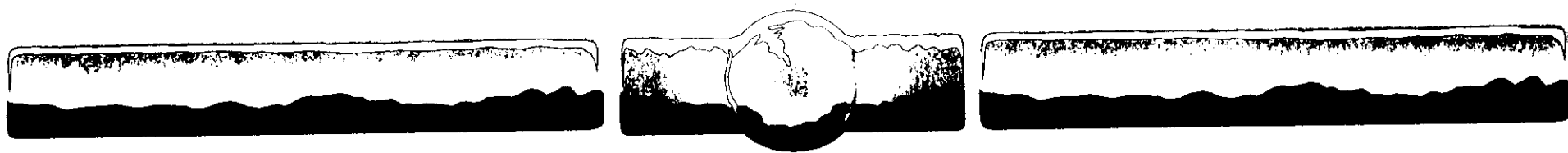
- I. Preliminary Questions**
- II. Overview of Agreement**
- III. Upper Snake Component**
- IV. Salmon/Clearwater Component**
- V. Nez Perce Tribal Component**
- VI. Conclusion**



# I. Preliminary Questions

What has been going on during the past five years?

- Parties to the litigation have been in court-ordered, confidential mediated settlement negotiations over the SRBA water rights claims of the Nez Perce Tribe; and
- The process has taken considerable time due to the complexity of the Agreement and the need to obtain the necessary information required to achieve long-term certainty under the federal Endangered Species Act, among others.



## **I. PRELIMINARY QUESTIONS (cont.)**

### **Is the Agreement effective now?**

- **No, the Agreement will only become effective if Congress, the Nez Perce Tribe and the Idaho Legislature approve the Agreement, the SRBA enters a decree approving the water rights set forth in the term sheet and the federal agencies issues ESA biological opinions consistent with the terms of the Agreement; and**
- **These actions must be completed by March 31, 2005.**



## **II. Overview of the Agreement**

### **Three Components:**

- 1. Upper Snake River Flow Component**
- 2. Salmon/Clearwater Component**
- 3. Nez Perce Tribal Component**



## II. OVERVIEW OF THE AGREEMENT (cont.)

### Scope

- Resolves all Nez Perce federal reserved water right claims;
- Provides ESA incidental take coverage for diversions of water within the Snake River Basin above Hells Canyon;
- Provides ESA incidental take coverage for forest practices within the Salmon/Clearwater Basins on enrolled lands; and
- Provides a *voluntary* opportunity for water users in Salmon and Clearwater Basins to obtain ESA incidental take coverage.



## II. OVERVIEW OF THE AGREEMENT (cont.)

### General Principles

- Compliance with state law and state administration of water (protects state sovereignty);
- Resolution of Tribe's claims;
- Protect status quo and minimize impact on future development;
- Willing lessor/willing seller; and
- Endangered Species Act ("ESA") & Clean Water Act ("CWA") protection.



## III. Upper Snake Component

### Facts

- Biological Opinions (“BiOps”) (National Marine Fisheries Service “NMFS” & Fish and Wildlife Service “FWS”) covering all species affected by Bureau of Reclamation (“BoR”) Upper Snake operations and all private actions associated with BoR Upper Snake operations;
- Covers obligation of flow for both Upper Snake and Federal Columbia River Power System (“FCRPS”) operations; and
- No jeopardy Biological Opinions.

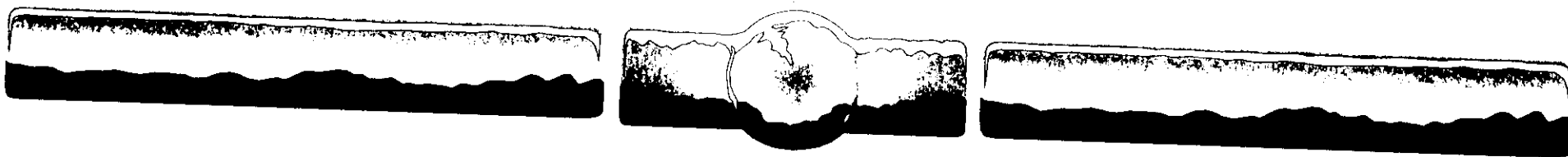




### **III. UPPER SNAKE COMPONENT (cont.)**

**This component consists of the following parts:**

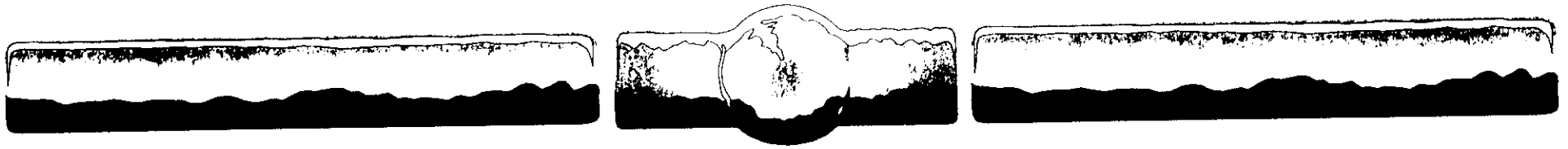
- **Tier 1: Minimum flows defined by the Swan Falls Agreement will be decreed by the SRBA Court to the Idaho Water Resources Board.**
- **Tier 2: Flow Augmentation Program based upon renewal of Idaho Code § 42-1763B for the term of the Agreement. The Agreement may extend for a period of up to 30-years.**



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Minimum Flows**

- **Swan Falls minimums decreed to the Idaho Water Resources Board ("IWRB"), which will incorporate the terms and conditions of the Swan Falls Agreement;**
- **Administration of minimum stream flows will be the responsibility of the IDWR; and**
- **Injunctive relief available.**



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Effect of Agreement on Conjunctive Management**

- **Rental of water for flow augmentation will be in competition with rental of water for conjunctive management solutions;**
- **Provides a cap on the amount of flow augmentation thereby reducing the potential conflict over use of water for flow augmentation;**
- **Natural flow augmentation will reduce the demand for storage water for flow augmentation above Milner;**



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Effect of Agreement on Conjunctive Management (cont.)**

- **Puts upward pressure on rental price in the short-term;**
- **Will impact reliability of refill;**
- **Will allow BoR to be more cooperative on conjunctive management; and**
- **Removes cloud of ESA over all water users.**



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Flow Augmentation**

- Pursuant to State law and regulations;
- Pursuant to existing water bank rules and local rental pool procedures including:
  - Last to fill;
  - Procedures for priorities among renters and lessors (“AG PREFERENCE”);
  - Limited exception;
- No changes to water bank or local rental pool procedure without spaceholder consent.



### III. UPPER SNAKE COMPONENT (cont.)

#### Flow Augmentation (cont.)

- Water users agree to refrain from exercising “AG PREFERENCE” on certain specific BoR uncontracted space;
- AG PREFERENCE waiver is only effective if the agreement has not been terminated or has not expired;
- *No minimum guaranteed flow*, and
- Reauthorize up to 427,000 ac/ft rental of water on willing lessor basis for flow augmentation.



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Flow Augmentation (cont.)**

**The following Uniform rental rate is established for all stored water:**

- **\$14 per acre-foot through 2012**
- **\$17 per acre-foot from 2013 – 2017**
- **\$20 per acre-foot from 2018 – 2022**
- **\$23 per acre-foot from 2023 – 2030**



### III. UPPER SNAKE COMPONENT (cont.)

#### Flow Augmentation (cont.)

- BoR may acquire on a permanent basis 60,000 ac/ft of natural flow (“NATURAL FLOW”) in mid-Snake (below Milner) in addition to storage water rented for flow augmentation.
  - NATURAL FLOW shall be used to meet the 427,000 ac/ft objective.
  - NATURAL FLOW shall be rented through the IWRB’s water bank pursuant to water bank rules.
  - In a wet year, the BoR may be able to use up to 487,000 ac/ft of water for flow augmentation (427,000 ac/ft storage + 60,000 ac/ft NATURAL FLOW).





### III. UPPER SNAKE COMPONENT (cont.)

#### Flow Augmentation (cont.)

- Powerhead in Anderson Ranch Reservoir (41,000 ac/ft) and Palisades Reservoir (157,000 ac/ft) is available pursuant to the following terms and conditions:
  - Water users agree to refrain from exercising AG PREFERENCE on Anderson Ranch Reservoir and Palisades Reservoir powerhead.
  - AG PREFERENCE waiver is only effective if the agreement has not been terminated or has not expired.



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Flow Augmentation (cont.)**

- Shall not interfere with minimum conservation pools.
  - If used, this powerhead shall be the last to last to fill.
  - Must be in compliance with State law.
  - No adverse impacts on spaceholders, including rates for reserved power.
- 
- All flow augmentation water is last to fill.



### III. UPPER SNAKE COMPONENT (cont.)

#### Other Information

- No impact on power rates by using powerhead.
- One time \$2 million payment to localities affected by NATURAL FLOW acquisitions.
- Milner Agreement will be renewed for a time limit consistent with the term of the agreement subject to terms and conditions acceptable to the water users.



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Other Information (cont.)**

- **BoR has the responsibility to manage flow augmentation to meet the needs of all species covered by this agreement.**
- **The federal agencies shall be responsible for managing and delivering water to avoid the following:**
  - **Violations of the CWA (maximum extent practicable),**
  - **Jeopardy to resident species, and**
  - **Significant impacts to recreation.**



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Other Information (cont.)**

- **State will not require additional measures for water users or permit holders due to flow augmentation.**
- **No party shall use CWA to require additional flows from the Upper Snake.**



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Right to Terminate**

- **If Biological Assessment is not acceptable (must be no jeopardy).**
- **If BiOp is not acceptable (must be no jeopardy).**
- **Breach of agreement.**
- **Termination of one component does not terminate other components.**



### **III. UPPER SNAKE COMPONENT (cont.)**

#### **Reinitiation Conditions**

- **Term is for 30 years.**
- **ESA Reinitiation can occur based upon the following:**
  - **If State law is changed to prevent U.S. from renting water:**
  - **No automatic reinitiation if FCRPS BiOp requires reinitiation,**
  - **Flow or other obligations (delisting) are no longer necessary, and**
  - **Changed circumstances.**

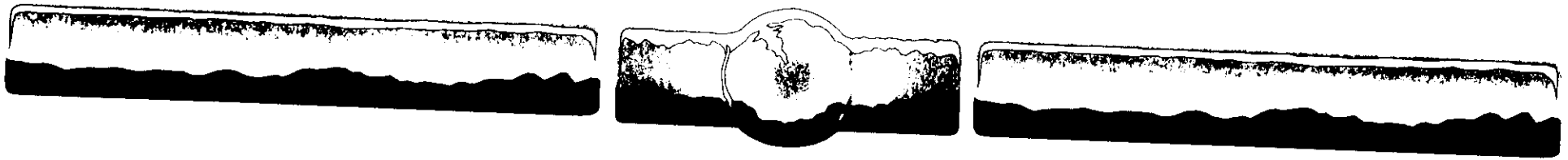


### III. UPPER SNAKE COMPONENT (cont.)

No additional water for flow augmentation from the Upper Snake, unless . . .

- Jeopardy BiOp on Upper Snake (after all measures are taken);
- Other BiOp actions have been implemented;
- All water made available has been rented; and
- FCRPS BiOp discretionary measures have been exhausted.

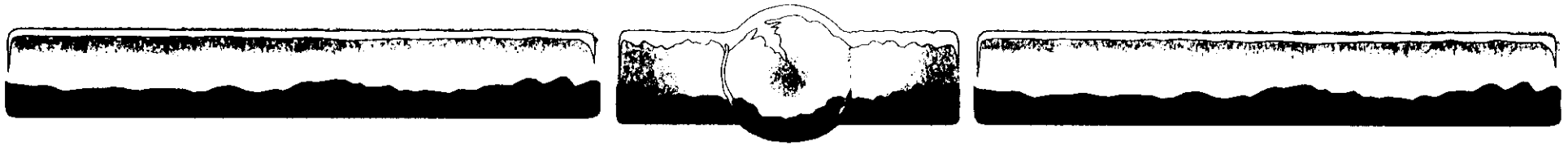




### III. UPPER SNAKE COMPONENT (cont.)

The lawyers are happy, because:

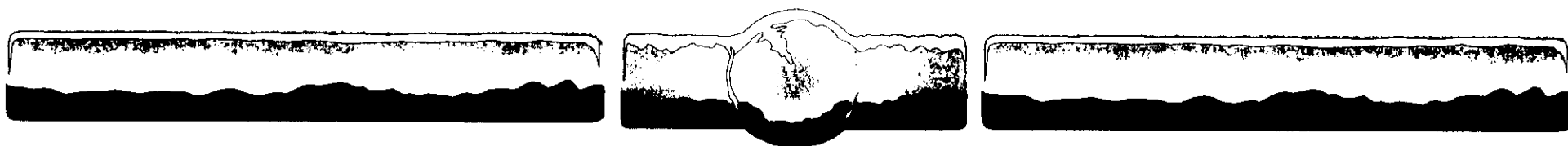
- No legal concession that ESA consultation is even necessary or that flow augmentation helps the species; and
- Flows provided under the agreement are deemed by the responsible federal agencies to satisfy ESA and CWA flow obligations.



## **IV. Salmon/Clearwater Component**

**This component consists of two parts:**

- 1. State instream flows on Tribal priority streams**
- 2. State section 6 ESA cooperative agreement, which consists of the following three programs:**
  - Instream Flow Program**
  - Idaho Forestry Program**
  - Habitat Improvement Program**



## **IV. SALMON/ CLEARWATER COMPONENT (cont.)**

### **Instream Flows**

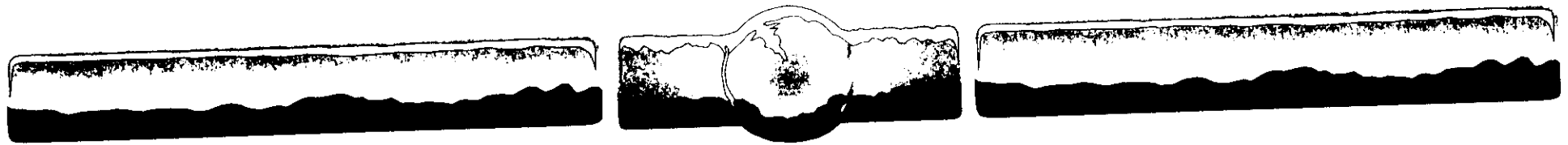
- **The State will establish instream flows on 184 streams in the Salmon and Clearwater Basins identified in Appendix I;**
- **All instream flows will have priority dates no earlier than the date of the final settlement;**
- **All instream flows will be subordinated to future domestic, commercial, municipal and industrial (DCMI) uses and to an identified amount of water for other uses;**



## **IV. SALMON/ CLEARWATER COMPONENT (cont.)**

### **Instream Flows (cont.)**

- The 162 streams identified on List A will be quantified pursuant to a formulate set forth in the Appendix;
- Instream flows on 22 developed streams identified on List B will be negotiated at the local level in a process similar to the Lemhi Conservation Plan; and
- Funds from the Habitat Trust Fund will be available to assist with implementation of the instream flows.



## **IV. SALMON/ CLEARWATER COMPONENT (cont.)**

### **ESA Section 6 Agreement**

- Under Section 6 of the ESA, the federal government is authorized to enter into cooperative agreements with states for the purpose of managing a program for conservation of protected species;
- The term sheet contemplates the state assuming the lead in implementation of such a program within the terms of agreement; and
- The federal government would provide \$25 million for implementation of the program.



## **IV. SALMON/ CLEARWATER COMPONENT (cont.)**

### **Instream Flow Program**

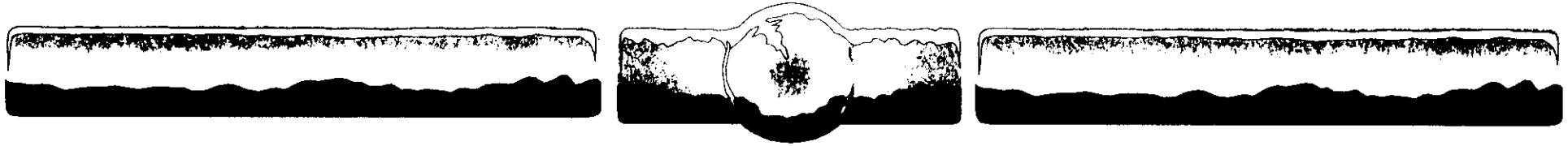
- **Water Users will be able to enroll in a *voluntary* program and receive incidental take coverage under the Endangered Species Program;**
- **Habitat Improvement Program will be used to implement conservation agreements; and**
- **State legislation will be required to provide mechanism for acquiring and protecting water for instream flows.**



## IV. SALMON/ CLEARWATER COMPONENT (cont.)

### Idaho Forestry Program

- A *voluntary* enrollment program will be established by Idaho Department of Lands;
- Landowners agreeing to implement the measures set forth in the Agreement sheet will receive ESA incidental take coverage;
- The program consists of supplemental measures for riparian areas and roads; and
- An adaptive management program will be implemented.



## IV. SALMON/ CLEARWATER COMPONENT (cont.)

### Summary

- All existing water rights are protected;
- Future DCMI is protected and a specified amount of future irrigation use;
- State retains right to change state instream flows in the future; and
- ESA Section 6 cooperative agreement provides for *voluntary* participation.





# V. Nez Perce Tribal Component

## Key Elements

- 50,000 acre feet consumptive use federal reserved water right for use on tribal lands subordinated to all existing uses;
- \$50 million Tribal Development Fund;
- \$23 million fund for domestic water supply and sewage systems for tribal communities;



## **V. NEZ PERCE TRIBAL COMPONENT (cont.)**

### **Key Elements (cont.)**

- **MOU regarding 200 KAF of Dworshak water to protect reservoir elevation;**
- **Enhancement of Tribal hatchery program;**
- **Recognition of 587 springs and fountain claims on federal land;**
- **Dismissal of all 1,263 springs and fountain claims on state and private land;**



## V. NEZ PERCE TRIBAL COMPONENT (cont.)

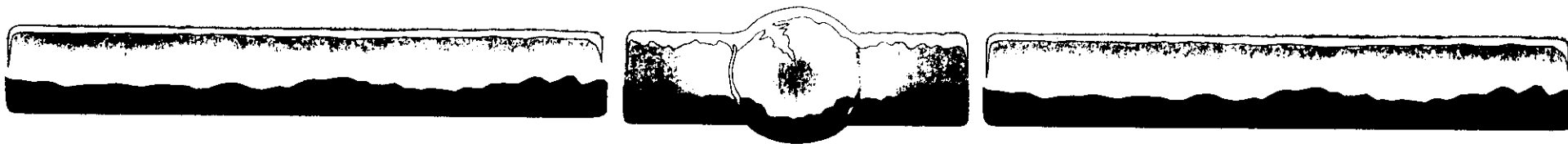
### Key Elements (cont.)

- Up to \$7 million in value of BLM Lands within the 1863 Boundary of the Nez Perce Reservation, excluding lands in Clearwater Corridor;
- \$10.1 million in lieu of uncontracted space; and
- Approximately \$13 million from Habitat Trust Fund for Use in Salmon and Clearwater Basins for habitat improvement.



## VI. Conclusion

- The risk of litigation arises in two contexts – the SRBA and environmental compliance litigation.
- Cases to consider are:
  1. Rio Grande Silvery Minnow v. Keys
  2. Western Watershed Project v. Jones
  3. National Wildlife Federation v. NOAA
  4. American Rivers v. NOAA



## **VI. CONCLUSION (cont.)**

- **The agreement provides for Willing Lessor/Willing Seller.**
- **ESA & Clean Water Act (CWA) Protection:**
  - **ESA**
    - ❖ **The settlement provides protection under the ESA. However, the agreement provides for a 30 year BiOp subject to reopeners.**
  - **CWA**
    - ❖ **The settlement provides reasonable protection and process under the CWA.**



## VI. CONCLUSION (cont.)

- Final settlement of Nez Perce claims versus risks of proceeding with litigation;
- Protection of current water users' storage and NATURAL FLOW water rights;
- No jeopardy BiOp for all Upper Snake water diversions;
- Maintains State control of the administration of water in Idaho;
- Cap on flow augmentation quantity 427,000 (dry year), 487,000 (wet year);



## **VI. CONCLUSION (cont.)**

- **Thirty year settlement;**
- **ESA/CWA protection - maximum extent practicable;**
- **Protection against third party lawsuits - agency deference; and**
- **Avoid expensive litigation with uncertain outcome for water users (risk/benefit).**



# CLOSING THOUGHTS

